

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 UNITED STATES OF AMERICA,

4 v.

22 CR 273 (JSR)

5 VITALY BORKER,

6 Defendant.

Sentence

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7 New York, N.Y.
8 April 28, 2023
9 3:30 p.m.

10 Before:

11 HON. JED S. RAKOFF,

12 District Judge

13 APPEARANCES

14 DAMIAN WILLIAMS

15 United States Attorney for the
16 Southern District of New York

17 BY: MATTHEW WEINBERG
Assistant United States Attorney

18 MAYER BROWN LLP

Attorneys for Defendant

19 BY: GLEN A. KOPP
ELENA SANTO
20 JINYOUNG LEE

21 Also Present:

Christopher O'Rourke, Postal Inspector

1 (Case called)

2 MR. WEINBERG: Good afternoon, your Honor, Matthew
3 Weinberg appearing for the government. With me at counsel
4 table is Postal Inspector Christopher O'Rourke.

5 THE COURT: Good afternoon.

6 MR. KOPP: Good afternoon, your Honor, Glenn Kopp,
7 along with Elena Santo and Jinyoung Lee of Mayer Brown on
8 behalf of Vitaly Borker.

9 THE COURT: Good afternoon.

10 We are here for sentence.

11 The first thing the Court has to do is to calculate
12 the sentencing guidelines. The probation office had a
13 presentence report. It calculates the offense level at 16 and
14 the criminal history category as IV, roman numeral IV.

15 Any objection to that by the government?

16 MR. WEINBERG: No, your Honor.

17 THE COURT: Any objection by the defense?

18 MR. KOPP: No, your Honor.

19 THE COURT: The Court also agrees with that
20 calculation and will adopt it.

21 Then with respect to the presentence report as a
22 whole, the defendant had numerous objections, some of which
23 were adopted by the probation department, indeed some with the
24 government's consent, but others were not.

25 Are there any of those objections that defense counsel

1 is now pursuing?

2 MR. KOPP: No, your Honor.

3 THE COURT: Very good. I will adopt the presentence
4 report.

5 Just for the record, I assume your client read and
6 discussed with you the presentence report, yes?

7 MR. KOPP: That's correct, your Honor.

8 THE COURT: Very good.

9 Now we turn to what is of primary interest, which is
10 where under Section 3553 the defendant should be sentenced.

11 Let me hear first from defense counsel, then from
12 government counsel, and then from the defendant, if he wishes
13 to be heard.

14 MR. KOPP: Your Honor, if I may use the podium, if
15 that's OK.

16 Your Honor, I just want to note for the record that
17 Mr. Borker's mother is here today. Unfortunately, his
18 girlfriend/fiancé was unable to make it because she is picking
19 up a kid from school or daycare, so she won't be able to make
20 it today, but we appreciate --

21 THE COURT: I have their submissions, so that's very
22 helpful.

23 MR. KOPP: Your Honor, I have never enjoyed jail
24 visits more than our team's visits to Vitaly at Westchester
25 jail. Ever since we were assigned to Vitaly's case in October

1 of last year, he has greeted us with a
2 roll-up-the-sleeves-and-let's-get-to-work attitude. He took
3 pride in his ability to be a partner in helping us get up to
4 speed with the case after having come in months in with a large
5 amount of catching up to do with the discovery.

6 Vitaly was our enthusiastic guide as we prepared for
7 trial. And, impressively, he frequently expressed his
8 appreciation for how hard we, as a team, worked for him,
9 especially Jinyoung and Elena, two first-year associates,
10 working on their first criminal matter. Vitaly has always
11 treated them with respect.

12 When he was getting ready to plead guilty, he met it
13 with a sense of relief and hope that it would get him one step
14 closer to putting his criminal past behind him and returning to
15 his two boys, his mom, and his girlfriend.

16 Since Vitaly had been moved to MDC about two weeks
17 ago, however, we have seen a darker version of Vitaly, one who
18 is more full of fear and dread.

19 Once we get into the work preparing for the
20 sentencing, however, the analytical and determined Vitaly comes
21 out, but he's not the same person. As bad as jail was for him
22 in Westchester, his time at MDC Brooklyn is already taking a
23 toll. There are stabbings and lockdowns. He is being
24 dehumanized.

25 THE COURT: The Court is aware of the very bad

1 conditions in the MDC. I will take account of that. But of
2 course he is going to be moved, once sentence is imposed, to a
3 federal prison where most of those conditions will be
4 ameliorated.

5 I am not quite sure whether this is of more than
6 modest relevance here.

7 MR. KOPP: I understand, your Honor.

8 The point I'm trying to make here is, ultimately
9 Vitaly has been in for almost 15 months, a significant amount
10 of time, and I think the time at MDC for someone who is
11 involved in a nonviolent offense has extra weight. I
12 understand that the federal prison's long-term facilities are
13 different, but we have noticed a change and it has only been a
14 few weeks, but it has been significant.

15 THE COURT: I am glad you brought that to my attention
16 because I do wonder what the U.S. Attorney's Office has been
17 doing with respect to the conditions in the MDC. In sentence
18 after sentence after sentence, I am told by highly responsible
19 defense counsel that the conditions in the MDC have greatly
20 deteriorated, that the problems that used to be in the public
21 eye associated with Rikers Island on the state level have now
22 too often been seen at the MDC.

23 While this is a matter usually raised with the Court
24 legitimately for saying the sentence should be reduced from
25 what it otherwise would be because, in effect, it's a further

1 hardship that's being imposed, and I'm not unsympathetic to
2 that, I'm beginning to wonder whether the U.S. Attorney's
3 Office has really focused on its responsibilities.

4 The Bureau of Prisons, unfortunately, has a history of
5 saying everything is all right when it's often not all right.
6 I don't mean to minimize the very great difficulties that the
7 Bureau of Prisons has, but the point is is that the MDC has
8 become something of an outlier.

9 Independent of the sentence, I am going to ask the
10 Assistant U.S. Attorney to consult with the U.S. Attorney and
11 the chief of the criminal division and provide me, no later
12 than two weeks from today, with a letter which can be *ex parte*,
13 if necessary, and can be under seal, if necessary, but are not
14 compelled to be either, indicating whether in fact they agree
15 that the MDC is experiencing unusually severe problems over the
16 last couple of years, whether and what steps are being taken
17 beyond platitudes to rectify those problems.

18 Having said all that, I think it is in this case small
19 potatoes because, first, he has only been in the MDC a few
20 weeks. Many of the people I've had to sentence in recent
21 months have been there for many weeks, if not months.

22 Secondly, and more importantly, I think the primary
23 issues in this sentencing are, first, that Mr. Borker seems
24 incapable of learning his lesson, that he just continues to
25 engage in fraud. It's not my philosophy, although it's

permitted by section 3553, to impose an additional amount of time beyond what I would otherwise impose simply to incapacitate the defendant for what seemed likely to be his future crimes. I won't do that here, and I have never done that, even though the statute permits it. But I must say, it's hard for me to feel one ounce of sympathy for a defendant who, despite meaningful punishments in the past, just keeps doing it again and again and again.

The other issue that looms large in the Court's mind is the extent to which he harassed those who complained. I want to hear a little bit more about that. I've received some letters bearing on that.

Let's start with the first issue. How can I give this guy anything less than three or four years when he hasn't learned his lesson?

MR. KOPP: That's exactly an incredibly fair question, your Honor, and one we want to take on head on.

We think that the Vitaly that stands before you today is a different man, and not just because of the last 15 months, that there is a progressively -- it is hard to say. It's still fraud. It's still crimes that he committed again in 2020. But the nature and circumstances of those crimes have changed. The desperation which he faced when he got out of prison in 2020 is different than what he faced when he was committing crimes in 2010 and '11.

1 When he left prison in November of 2020, he had a
2 family to support, a child he had never met before, was born
3 right before he had gone in. He had a mother who was aging and
4 in worse condition than when he had gone in the first times.
5 And he had understandable conditions that limited his ability
6 to work in a field that he had gotten used to and that he
7 absolutely, 100 percent, should not have touched with a
8 ten-foot pole. He should have stayed away. It opened up the
9 worst demons in him, and he went back to doing what he had done
10 before.

11 But the crimes that he had committed earlier, your
12 Honor, and I think this is significant -- and his punishments
13 were driven by worse things than selling used glasses. They
14 were driven the first time by the threats. Not just bad
15 salesmanship; awful threats. The second time it was by a
16 threat to the sister of a codefendant here. That's not the
17 crime he committed. There are instances in which he used
18 inappropriate tactics in terms of dealing with customers. But,
19 your Honor, that is a small number of the overall number of
20 customers that came to that website and bought glasses.

21 THE COURT: That's a fair point, but let me ask you
22 about -- this is also a question I want to hear from the
23 government on. There was one case, this goes back to his prior
24 convictions, at least one case where he told the victim he knew
25 where she lived and would commit sexual violence on her. There

1 were others that he threatened with physical violence. But I
2 am not clear whether that was true with respect to any of the
3 victims of this case, of the crime that I have to sentence him
4 on. To the extent that occurred in the past, that was taken
5 into account in the sentences that were imposed in the past,
6 which were often substantial sentences. I certainly do not
7 propose to sentence him again for that past -- those threats.
8 But were there any such threats in this case?

9 MR. KOPP: Not that I'm aware of, your Honor, no.

10 THE COURT: I want to confirm that with the government
11 in a minute, but I think that is a mitigating factor.

12 MR. KOPP: Thank you, your Honor.

13 I do think that the Vitaly of today is a different
14 person. He has learned -- he didn't learn enough from the
15 previous mistakes, and there is no dispute that he needs to be
16 punished, and he has been punished significantly already, we
17 would suggest.

18 Again, the change to MDC was only recent. This is
19 something that we only would have said because of what happened
20 over the last couple of days. But we still think that the 14
21 months he spent in Westchester is significant.

22 This crime, your Honor, was not about greed.
23 Mr. Borker didn't pocket or profit every dollar that came into
24 the company. He didn't lead a lavish lifestyle. He had to
25 support his family, his girlfriend, and soon-to-be fiancé. Has

1 no family in the United States. She is a widower.

2 You saw some of the things she said about the changes
3 in her life and the hope that he gave her when they got
4 together. So he had a family to support in a way that he
5 didn't have those responsibilities in the same way before, and
6 he understands that the risks that he took, the mistake he made
7 impact the victims. They impact his mother, his girlfriend,
8 and his two children in ways that he is profoundly impacted by.
9 The letters that you have seen from his family really
10 demonstrate that, and it's not just us saying that, your Honor.

11 When he was in Westchester, one of the nice things
12 about it, it was the ease at which he could communicate with
13 the rest of the world. He spoke to his mother five times a
14 day. She is 85. She suffers from numerous ailments. In fact,
15 Vitaly was sort of an early adopter to working from home
16 because he could be home to drive her to appointments. And it
17 is ironic that the thing that he did to try to be home for his
18 mother led him to make the mistakes that have put him here
19 today.

20 Going back to when he left the halfway house in
21 November of 2020, even his mother noticed that despite not
22 knowing the deceit he was involved in, nonetheless, she noticed
23 a different person. When he spoke to customers, he didn't
24 raise his voice. He treated them all respectfully. And there
25 are times when did he not in his email exchanges, but not to

1 the level that he did before. So lessons have been learned,
2 just not enough.

3 Your Honor, you saw in the letter from Vitaly's
4 14-year-old son, Ryan, who described a doting father who is 100
5 percent committed to finding ways to be present in his son's
6 life despite the obstacles. Vitaly got involved in managing
7 rental apartments in New Jersey to make money by Airbnb in an
8 effort to be closer to Ryan, because Vitaly's exwife had moved
9 them to New Jersey. Vitaly used that time with Ryan to teach
10 him practical things, like how to fix can things around the
11 house when he cleaned the apartments.

12 Vitaly's absence has and will impact Ryan severely,
13 and that's something that he has to live with.

14 Again, you saw what Vitaly's fiancé, Marina, has
15 written about the impact that he has had on her life. And she
16 will be raising and has been raising their five-year-old by
17 himself, without a family, and until Vitaly comes home that
18 will be a struggle.

19 The other ways, your Honor, why we think this is a
20 different man who sits before you is some of the things you saw
21 from his friends who wrote in support. I think it's Exhibit 12
22 to our letters from Russell Levy. He writes about Vitaly
23 having taken steps to improve himself, to better himself over
24 the years, seeking therapy and counseling, and we don't talk a
25 lot, and our letter mentions some of the struggles he has had

1 with mental illness. That is not an excuse for his conduct.
2 It is just a fact of his life, and he has taken steps,
3 including --

4 THE COURT: No. I think it's a mitigating factor. I
5 found that quite interesting, and I appreciate all the
6 psychiatric information that was provided by both sides.

7 MR. KOPP: Your Honor, one other thing we wanted to
8 talk about in terms of the sentence. You mentioned why
9 shouldn't you sentence him to three or four years. The other
10 thing we thought was interesting was the sentencing guidelines,
11 proposed amendment on criminal history.

12 THE COURT: Here is the problem you have there. As I
13 have stated on the record numerous times, I think the
14 guidelines as a whole are totally irrational. I give them
15 almost no weight other than what I'm compelled to give them by
16 operation of law. That's why I calculate those guidelines at
17 the start.

18 I don't want to waste everyone's time with describing
19 why I regard the guidelines as totally irrational, because it
20 would take me several hours. But just in brief summary, the
21 guidelines, first, are based on the assumption that numbers can
22 be assigned to particular aspects of all the multiple factors
23 that any court has to consider in a sentence.

24 I have never actually seen the sentencing commission
25 justify in any principled way why it picks two points for this

1 or three points for that. In my imagination, they just throw
2 it down the stairway and see which one lands on stairway 2,
3 stairway 3, or stairway 4.

4 Then we get to the fact that in white collar crimes
5 the guidelines place inordinate emphasis on the amount of loss.
6 In a typical white-collar case that is about 70 percent of the
7 calculation of the offense level. The same problem exists in
8 drug cases where it's at amount of drugs that are distributed
9 that typically cause about 70 percent of the offense level
10 calculation.

11 It's not that those things are irrelevant, but why are
12 they given such heavy weight? It is because they could be
13 counted, and this is an arithmetic system, so anything that can
14 be counted gets emphasized because all the rest is totally
15 subjective.

16 Then there is the sad history, which is not at
17 relevant here to this particular case of the racist history of
18 the guidelines, such as, for example, giving crack cocaine a
19 hundred-time multiple to powder cocaine, even though there is
20 no scientific basis for doing that. Crack cocaine is simply
21 baked powder cocaine.

22 But because of the fear that it was associated with
23 violence, even though that happened to be a function of the
24 communities in which it was operating, as opposed to the drug
25 itself, they had this absurd and irrational calculation that

1 operated in a clearly discriminatory manner against persons
2 with color.

3 And when they changed it, the best they could get out
4 of Congress was 18 to 1. Even though that is just as
5 irrational as the 100 to 1, it's just not as bad.
6 Irrationality seems to be the modus operandi to those who
7 address the guidelines. Then there is, of course, the fact
8 that the sentencing commission itself has been under heavy
9 pressure from Congress and often directed by Congress to
10 evermore up the guidelines and make them evermore punitive.

11 Then there is the fact that from the very start, the
12 guidelines expressly said that things like family history would
13 be irrelevant because that was not, quote, truth in sentencing,
14 what baloney that is, as if the defendant is some person from
15 Mars who lands here and commits his or her crimes without the
16 long extensive history, psychological and familial, that every
17 defendant that I have seen carries as part of his baggage.

18 But I won't go on. My point is, you don't need to
19 worry about the guidelines.

20 MR. KOPP: Thank you, your Honor. I think I'm
21 probably going to stop there, unless your Honor has questions.

22 THE COURT: That's fine. I'm anxious to hear from the
23 government. We will come back to you and your client in a
24 minute.

25 Let me hear from the government.

1 MR. WEINBERG: Yes, your Honor.

2 It's the government's view, just to respond to
3 something defense counsel said, that the nature of this crime
4 did not change in any significant way from the nature of the
5 prior two crimes.

6 With respect to the threats, because the Court has
7 inquired about that, it is correct that the government did not
8 identify any threats, significant threats of physical violence,
9 sexual violence, anything rising to the level of a new crime.
10 Of course, he was charged with federal crimes arising out of
11 the threats in his first case. He was not charged with that in
12 the second case. The second case was just a fraud case. This
13 case continues. In that pattern it's a fraud case.

14 There certainly were customers, as the Court has
15 gotten a flavor of from the victim-impact statements and some
16 of the emails, who the government would say were harassed, not
17 rising to the level of a crime, but received more than just
18 poor customer service, but real harassment that they should not
19 have received.

20 But, fundamentally, the defendant was convicted twice
21 of operating fraudulent eyewear websites or fraud relating to
22 eyewear websites.

23 THE COURT: In many ways, it seems to me, he made an
24 irrational choice. He knew, from his prior experience, that if
25 he continued with this kind of fraud that he would go to prison

1 if caught. He said, for whatever reason, I'll take the risk.
2 To put a slightly unfair slant on the point you just made, I'll
3 be a much sweeter fraudster this time around. But he knew for
4 sure that the natural reaction of any judge to his reindulging
5 in the same fraudulent behavior was, OK, you cut a bargain.
6 The bargain was, there was X percent chance you will get
7 caught, but if you did get caught you knew you were going away.
8 I'm happy to abide by his bargain.

9 MR. WEINBERG: Yes, your Honor. In that regard, it's
10 worth noting, from the government's perspective, that the
11 defendant was transferred to the residential reentry center in
12 June 2020 and then fully released from custody in November of
13 2020. But in June 2020, he was at what is commonly referred to
14 as a halfway house. That's exactly when this website started
15 and the fraud kicked off. So it really was kind of at the
16 first opportunity to engage in really, again, what the
17 government views as fundamentally the same conduct.

18 The government submitted as an exhibit --

19 THE COURT: When you're good at something, you want to
20 pursue it.

21 MR. WEINBERG: Fair enough, your Honor.

22 The website itself is nearly identical to the last
23 website. And the website just makes a series of false
24 representations about what the business was offering.

25 Without getting into too much of the nitty gritty or

1 details about what happened to this customer or that customer,
2 fundamentally, the defendant had twice previously been
3 convicted of operating fraudulent websites, so he knew that
4 what he was putting on the websites would be considered fraud,
5 unless there was some significant change in what the website
6 was actually offering, and it's the government's contention
7 that there was not a significant change than what the website
8 was offering. It was the same business, or materially the same
9 business, and the same website.

10 To the extent that there was any changed behavior this
11 time, whether it be on the harassment side or on the fraud
12 side, a point that the government is not necessarily conceding,
13 but to the extent there was any changed behavior, in the
14 government's view, that is easily outweighed and
15 counterbalanced by the fact that it was the third conviction,
16 that there had been two prior convictions. I think it's
17 perhaps putting a different spin on what the Court said. Even
18 if it's 80 percent as bad, which is the point that the
19 government is not conceding, even if it was 80 percent as bad,
20 it was the third time.

21 THE COURT: Let me ask you a much more minor -- minor
22 is the wrong word, but not directly relevant to the sentencing
23 itself. But assuming I impose the sentence beyond time served,
24 which is highly likely, is there any reason he can't be moved
25 back to Westchester until he is transferred to whatever prison

1 he is going to?

2 MR. WEINBERG: The government certainly has no
3 objection to that. As the Court, I believe, is aware, we don't
4 have any real control.

5 THE COURT: No. But you can have some persuasive
6 input.

7 MR. WEINBERG: Perhaps it might be more persuasive if
8 I knew that the Court was interested in that outcome.

9 THE COURT: I'm happy to make that recommendation and
10 happy to have the U.S. Attorney's Office make its best efforts
11 to implement that recommendation.

12 MR. WEINBERG: I'm very happy to do that, your Honor.

13 THE COURT: Let me hear, finally, anything further the
14 defense counsel wanted to say, and then we will hear from the
15 defense, if he wished to be heard.

16 MR. KOPP: Your Honor, just one thing.

17 I do this with some hesitation because I understand
18 this is not to belittle or limit what happened.

19 But just one piece of context is that the business
20 itself and the numbers we are talking about here and the
21 individual impact on people, again, it doesn't change the fact
22 that he made this decision and he knew that he had been --

23 THE COURT: It was smaller in scope and impact than
24 many of the federal fraud cases that I have seen in the past,
25 and I think that's relevant.

1 MR. KOPP: Thank you, your Honor. That is right.

2 THE COURT: Let me hear from the defendant.

3 THE DEFENDANT: Your Honor. I have written to the
4 Court a letter in preparation for sentencing which I hope
5 you've read.

6 THE COURT: Yes.

7 THE DEFENDANT: In addition, I just wanted to
8 highlight a few other points that I think are significant.

9 Your Honor, first and foremost, I accept full
10 responsibility for my conduct. I absolutely dropped the ball
11 while I was doing work for Eyeglasses Depot. I blame nobody
12 but myself. This did not have to happen. Besides the fact
13 that I should have never ever been involved in this business, I
14 should have been completely transparent regarding the origin
15 and the condition of the eyewear that I caused to be shipped to
16 these customers.

17 It was my plan that after being released from prison
18 in 2020, I would sell my interest in all of these websites and
19 be compensated on a monthly basis while the websites are being
20 operated by others, as they were while I was in prison for over
21 two years. I wanted very much to have a secondary source of
22 income from the websites and do other things that were in
23 compliance with supervised release.

24 Unfortunately, being unable to find work during the
25 peak of the pandemic, when I was released, coupled with my

1 impulsivity, I simply found myself sucked back into a business
2 that I was prohibited from operating.

3 I justified my poor chooses to reenter the eyeglass
4 business on the fact that my financial obligations were
5 drowning me, and I was tired of taking advantage of my family,
6 who was supporting me financially.

7 I want your Honor to know that I did participate in
8 many other businesses, which, unfortunately, simply did not
9 financially pan out for me. I developed a website for my
10 fiancé, who is now running her own business selling child bike
11 trailers, but that became a one-man operation. I couldn't work
12 there and earn a profit.

13 I developed a software platform for another friend
14 that identified high leads for high-ranking food items on
15 Amazon, and he's sitting right behind me. That is Mike. That
16 investment ended up putting me in a loss. I signed a
17 consignment deal to sell some of my eyewear stock on the
18 popular website the RealReal. That worked out great, but I had
19 limited stock that was desirable.

20 I then subleased and furnished three apartments in New
21 Jersey for income on Airbnb with the help of my mother. By the
22 time I started seeing a profit, I was arrested in this case and
23 I lost everything my mother invested, everything.

24 I made some sales in eyewear parts on eBay but the
25 profit was petty. I really, really tried to do other things

1 and be able to support my financial obligations.

2 In hindsight, however, I should have tried harder to
3 distance myself from eyewear and find another career in a free
4 world with endless possibilities.

5 Most importantly, your Honor, I want you to know that
6 I was not motivated by greed. I did not lead a lavish
7 lifestyle. I earned less in all of my ventures combined than I
8 did working on Wall Street out of college 26 years ago. I wore
9 the same clothing I purchased in 2010. I drove the same
10 vehicle since 2015. I was unable to make critical repairs to
11 my house that's dangerously falling apart. When the probation
12 department came to my house, the entire balcony is falling
13 apart.

14 I spent virtually nothing on myself. I spent nothing
15 on myself, nothing at all. Every dollar I earned went towards
16 my children, everything.

17 On top of everything, I inherited a whole new set of
18 expenses, attributable to my exwife, who moved to New Jersey,
19 where I found myself driving multiple times a week to be with
20 my teenage son. I acknowledge that I failed miserably in my
21 decision making. I want to express how sorry I am to the
22 customers I deceived, my family and this Court. I'll make sure
23 I have learned my lessons from my mistakes. I will treat my
24 customers with the respect and honesty that they deserve.

25 My goal is to put this catastrophe behind me and start

1 a new chapter in my life. I have developed two business ideas
2 that I will secure permission from probation before I put them
3 into action.

4 My first idea, I want to help my fiancé continue to
5 develop her stroller business. She wants to grow her business
6 by working with manufacturers to get into big retail stores. I
7 want to use my experience with the justice system, prison, over
8 the past 13 years to help others by acting as a consultant to
9 families that have a family member in prison. I have firsthand
10 experience, unfortunately, to how committing crime and being
11 sentenced deeply affects a person's family members, friends and
12 community. I want to help families through the prison process
13 and become a prison consultant.

14 Even after all the problems that I have caused
15 throughout the years, I still have many people who remain
16 committed, supportive, and believe in me, and I will not
17 disappoint them. I will never do this again. I will never be
18 involved in any of these kinds of businesses that would
19 jeopardize my liberty, my freedom. I just want to be with my
20 family, and I want to start a new life.

21 This is over. The glasses business is over.
22 Everything that I did, everything that I built, it's over. I
23 will never touch it again. I will never come near it again.
24 You will never see me in this courtroom again. The intern will
25 never hear about me again.

1 This is a huge mistake. It didn't have to happen. I
2 should have drove a taxicab when I came home. I should have
3 done anything other than this, anything, anything. I should
4 have sold my house. I should have defaulted on my mortgage. I
5 should have stayed home and not done anything.

6 Thank you for listening to me, your Honor.

7 THE COURT: Thank you very much.

8 There is one person in this courtroom to whom my heart
9 goes out. It is the defendant's mother because as the
10 defendant's own articulate statement demonstrates and as the
11 Court already recognized from the excellent submissions I have
12 received, this defendant is a highly intelligent person, a
13 person of great promise.

14 Yes, he has psychological difficulties, and that's
15 been a problem that he has had to deal with, but throughout he
16 has had the love and support of his mother, who now is herself
17 at an age where she is ever more in need of help from her son.
18 So in many ways she is a primary victim of the defendant's
19 misconduct.

20 As I say, my heart really goes out to her.

21 The factors bearing on sentence, and I have considered
22 all the factors under section 3553(a), largely point in favor
23 of a substantial sentence here. But I think there are some
24 mitigating factors.

25 One, which I have just alluded to, is the need to be

1 of help to his mother and his fiancé and child. Another is the
2 hope that this Court harbors that this, in many ways, gifted
3 human being can still turn his life around and still be a
4 productive and helpful citizen or person. And I also think
5 it's not irrelevant that, in the broader scheme of things, the
6 immediate crime that I'm sentencing this defendant for was not
7 one of huge financial impact in the way that many federal fraud
8 cases are.

9 Having said all that, we come back, of course, in the
10 end to the fact, he did it again and again and again, and he
11 did it here while he was on supervised release in a halfway
12 house and at a time when he should have been most aware of the
13 need to play exactly by the rules, not even come close to a
14 violation.

15 Putting all that together, the sentence that I
16 normally would have imposed here would have been three years.
17 I am going to knock that down to two and a half years, partly
18 for the mitigating reasons I have just mentioned and partly
19 for -- I give some credit to the fact that being in the MDC,
20 even for a few weeks, is, one could well argue, cruel and
21 unusual punishment.

22 The sentence of the Court is that the defendant is
23 sentenced to 30 months in prison, to be followed by three years
24 of supervised release on terms I'll get to in a moment. No
25 fine will be imposed because there will be a substantial

1 forfeiture in the sum of \$145,671.58.

2 Is that the same amount for restitution?

3 MR. WEINBERG: Not quite, your Honor. The government
4 was hoping to address that.

5 With respect to restitution, the government and
6 defense counsel have been in touch trying to arrive at a
7 consent restitution order. I think it's fair to say that we
8 are close, but we are not quite there yet. If the Court would
9 just order that it will be issuing restitution, and the
10 government thinks that it will be promptly be able to --

11 THE COURT: That is fine. I think you have to do that
12 in, I can't remember if it's 30 days or 90 days. Let's say 30
13 days and make sure we get it to me before then.

14 MR. WEINBERG: Yes, your Honor.

15 THE COURT: There is also, of course, a mandatory \$100
16 special assessment that must be paid.

17 In terms of supervised release, I take supervised
18 release in this case with particular emphasis because I
19 guarantee you, Mr. Borker, that if you violate supervised
20 release in even the slightest respect, I am going to send you
21 back to prison because you just gave me a very eloquent
22 statement about how you are going to turn your life around.
23 You better mean it.

24 The terms of supervised release are: First, the
25 mandatory conditions that the defendant not commit another

1 federal, state, or local crime, not possess a controlled
2 substance. In that regard, within 15 days of his release from
3 imprisonment he needs to submit to one drug test to be followed
4 by two periodic drug tests thereafter, and he must cooperate in
5 the collection of DNA. Once I receive the amount of
6 restitution, I will set a schedule for how much that is to be
7 paid. It will be a percentage of his gross monthly income
8 beginning in the second month of supervised release. But I
9 will need to know the amount before I set the percentage.

10 There will also be imposed the standard conditions 1
11 through 12. They appear on the face of the judgment and will
12 be gone over with the defendant by the probation officer when
13 the defendant reports to begin his period of supervised
14 release, which he must do within 72 hours of his release from
15 prison.

16 Finally, there are the special conditions: First,
17 that he will participate in outpatient drug and alcohol program
18 on the standard terms and conditions; second, he will
19 participate in an outpatient mental health treatment program on
20 the standard terms and conditions; third, that he cannot incur
21 new credit charges or open additional lines of credit without
22 the express prior approval of the probation officer unless he
23 is in compliance with the installment payment schedule that I
24 will impose once I hear from the parties on restitution;
25 fourth, that he must provide the probation officer with access

1 to any requested financial information; and, fifth, if the
2 probation office deems it necessary, he will permit the
3 probation office to install any application or software that
4 allows it to survey or monitor all activity on any computers,
5 automated services, or connective device that he will use
6 during the term of supervision. I will spell that out in more
7 detail in my final judgment.

8 Lastly, the defendant will be supervised by the
9 district of his residence.

10 Before I advise the defendant of his right to appeal,
11 is there anything else that either party needs to raise with
12 the Court?

13 Anything from the government?

14 MR. WEINBERG: Your Honor, other than just the
15 government moves to dismiss the open counts.

16 THE COURT: Yes. That motion is granted.

17 Anything from the defense?

18 MR. KOPP: Your Honor, just to reiterate, if there is
19 any way he could get back to Westchester pending his
20 transfer --

21 THE COURT: I strongly recommend that, and I'm asking
22 the U.S. Attorney, presumably jointly with defense counsel, to
23 make contact with the relevant people at the BOP and make sure
24 they know that's my recommendation, my strong recommendation.

25 MR. KOPP: Thank you, your Honor.

1 Just, lastly, to ask, respectfully, if your Honor
2 could make sure that if in any way that he could be sentenced
3 to a facility with RDAP so that he continue to address his drug
4 and alcohol issues and substance-abuse issues.

5 THE COURT: Yes. I will recommend that. I don't have
6 the power to order that.

7 MR. KOPP: Understood.

8 THE COURT: But I will recommend it.

9 MR. KOPP: Thank you, your Honor.

10 I know Mr. Borker's preference is if there is any way
11 that there is availability either at Schuylkill or Danbury
12 facilities, those would be preferable --

13 THE COURT: Again, I'm happy to recommend it. There
14 was a time when those recommendations were followed
15 automatically. But, unfortunately, with so-called mass
16 incarceration, there is less ability of the Bureau of Prisons
17 to necessarily follow those recommendations, but I'm happy to
18 recommend it.

19 MR. KOPP: Thank you, your Honor.

20 THE COURT: Mr. Borker, you have a right to appeal the
21 sentence.

22 Do you understand that? You need to speak.

23 THE DEFENDANT: Yes.

24 THE COURT: If you can't afford counsel for the
25 appeal, the Court will provide one for you free of charge.

1 Do you understand that?

2 THE DEFENDANT: Yes.

3 THE COURT: Very good.

4 (Adjourned)

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